
OPINION OF THE PUBLIC ACCESS COUNSELOR

CASSANDRA M. BETZNER,
Complainant,

v.

MACONAQUAH SCHOOL CORP.,
Respondent.

Formal Complaint No.
21-FC-129

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Maconaquah School Corporation, through its school board, violated the Open Door Law.¹ Jessica M. Heiser filed an answer on behalf of the school corporation. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on August 31, 2021.

¹ Ind. Code § 5-14-1.5-1 to -8.

BACKGROUND

On August 23, 2021, the Maconaquah Board of School Trustees convened in executive session. The Board provided public notice to the local media indicating the purpose of the meeting was for discuss of the assessment, design, and implementation of school safety and security measures, plans, and systems.

As a result, on August 31, 2021, Cassandra M. Betzner (Complainant) filed a formal complaint against MSC alleging the executive session amounted to a violation of the Open Door Law.

Specifically, Betzner contends the MSC Board drafted new back-to-school guidelines during the executive session and voted to approve them at a public meeting two days later.

On September 20, 2021, the MSC Board filed an answer to Betzner's complaint denying any violation of the Open Door Law. First, the Board argues that it provided the necessary public notice for the executive session it held on August 23, 2021. Second, the MSC Board contends the purpose of the executive session was permissible under the law. Third, the Board asserts that it did not take impermissible final action during the executive session on August 23.

ANALYSIS

1. The Open Door Law

The Open Door Law (ODL) requires public agencies to conduct and take official action openly, unless otherwise ex-

pressly provided by statute, so the people may be fully informed. Ind. Code § 5-14-1.5-1. As a result, the ODL requires all meetings of the governing bodies of public agencies to be open at all times to allow members of the public to observe and record the proceedings. *See* Ind. Code § 5-14-1.5-3(a).

Maconaquah School Corporation (MSC) is a public agency for purposes of the ODL; and thus, is subject to the law's requirements. Ind. Code § 5-14-1.5-2. Moreover, the MSC Board of School Trustees (Board) is a governing body for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b).

As a result, unless an exception applies, all meetings of the school board must be open at all times to allow members of the public to observe and record.

1.1 ODL definitions

Under the ODL, "meeting" means "a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business." Ind. Code § 5-14-1.5-2(c). "Official action" means to: (1) receive information; (2) deliberate; (3) make recommendations; (4) establish policy; (5) make decisions; or (6) take final action. Ind. Code § 5-14-1.5-2(d). Notably, the ODL defines "final action" as "a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance or order." Ind. Code § 5-14-1.5-2(g). The ODL also mandates a governing body to take all final action at public meeting. *See* Ind. Code § 5-14-1.5-6.1(c).

Additionally, “public business” means “any function upon which the public agency is empowered or authorized to take official action.” Ind. Code § 5-14-1.5-2(e).

2. Public notice

Betzner, in part, argues that the MSC Board failed to provide proper public notice for its executive session on August 23, 2021. Betzner contends the local newspaper only posted the notice on its website after being prompted to do so from members of the public.

Conversely, the Board argues that it provided proper notice for the executive session.

Generally, the ODL requires an agency to provide public notice of the date, time, and place of any meeting, executive session, or of any rescheduled or reconvened meeting at least 48 hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. The ODL requires agencies to post a copy of the notice at the agency’s principal office (e.g., city hall) or if there is no such office at the location of the meeting.

If the meeting is an executive session, the public notice must also state the subject matter of the meeting by specific reference to the enumerated instance or instances for which executive sessions may be held under the ODL. Ind. Code § 5-14-1.5-6.1(d).

Here, MSC contends that it provided proper notice for the executive session because the district posted electronic notice in a timely manner on its website with the required information. Additionally MSC asserts that it provided individualized notice to the local media.

It is true that Governor Holcomb issued an executive order in 2020 authorizing public agencies to give electronic public notice for meetings on the agency’s website.² The governor rescinded those provisions with Executive Order 21-13.³

As a result, the ODL required MSC to post public notice at the principal office or the location of the meeting in accordance with the ODL.

3. Executive session subject matter

Despite the ODL’s general rule of open meetings, the public may be excluded from certain meetings known as executive sessions. A governing body may only hold an executive session in the specific instances set forth under section 6.1 of the ODL. *See* Ind. Code § 5-14-1.5-6.1(b).

This office scrutinizes executive sessions a bit more closely than other types of gatherings simply because it is the exception to the presumption of openness. Accordingly, when an access law is to be liberally construed, its exceptions shall be narrowly constructed. *See Indianapolis Newspapers v. Ind. State Lottery Comm’n*, 739 N.E.2d 144, 154 (Ind. Ct. App. 2000).

3.1 Discussion of school safety plans

On October 1, 2020, this office published an informal opinion⁴ in response to an inquiry about whether a school board could call an executive session to discuss back-to-school or

² Exec. Order 20-04.

³ <https://www.in.gov/gov/files/Executive-Order-21-13-Recission-of-Prior-Directives1.pdf>

⁴ *Informal Opinion of the Public Access Counselor*, 20-INF-7 (2020).

reopening plans in accordance with ODL provision authorizing an executive session for discussion of the assessment, design, and implementation of school safety and security measures, plans, and systems. Ind. Code § 5-14-1.5-6.1(b)(3).

In that case, this office observed the following:

The executive session justifications are rooted in practicality in regard to the sensitivity of the subject matter being discussed. School safety and security plans may be held in closed door meetings to preserve the integrity and efficacy of the safety program itself. Active threats and responses should indeed be kept in-house to ensure those who intend to visit harm on schoolchildren or staff are not privy to those plans.

Back-to-school plans during the COVID-19 pandemic may be a separate issue, however, and not exactly what the legislature intended. While serious and not to be dismissed, COVID-19 is a passive threat insofar as public knowledge of public health plans will not give COVID a heads-up to target a child or a building. The virus, thankfully, does not have eyes and ears. The harm comes from the virus itself and not from knowledge of mitigation efforts.

It is difficult to imagine a scenario wherein those plans – or safety considerations generally - would be compromised if discussions were held during a public meeting.

...

Therefore, it is the official position of this office that back-to-school pandemic plan discussions should be held in public.

Although the legislature addressed the juncture of the public health emergency and public meetings during the 2021 legislative session, it did not add any provision to include back-to-school COVID-19 plans under the executive session subsection of the Open Door Law.

Therefore, this opinion follows the previous informal guidance.

4. Final action in executive session

Betzner argues that the MSC Board improperly drafted the back-to-school guidelines during the executive session on August 23, 2021. MCS contends that it did not draft the guidelines during the executive session, but even if it had done so it would not violate the ODL.

The Open Door Law prohibits a governing body from taking final action on public business in executive session. “Final action” means “a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order.” Ind. Code § 5-14-1.5-2(g).

Since the parties agree that the MSC Board took final action (e.g., a vote) on the back-to-school plan at the public meeting on August 25, 2021, this office concludes that the district did not take impermissible final action in the executive session two days earlier.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Board of Trustees for Maconoquah School Corporation violated the Open Door Law by failing to post public notice of the executive session in accordance with law, and by using the executive session for an subject matter not authorized by the ODL.

A handwritten signature in black ink, appearing to read 'LHB', is positioned to the right of the text.

Luke H. Britt
Public Access Counselor